



IT IS ORDERED as set forth below:

Date: July 29, 2008

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**Donna Awald, Barbara Beyer, Samara
Butty, Steven Payne, ETON Technology
Partners, LLC, David Fiacco, Lynn
Fraas, Steven Garrett, Clayton Houston,
Robert Lindsey, Lisa Cooper, and
Randall Cooper,**

Plaintiffs,

v.

**Rodney A. Bienvenu, Jr., Jude M.
Sullivan, and Ernest C. Mysogland,**

Defendants.

Adversary Proceeding
07-06582

Removed from the State Court of Fulton
County, Georgia: 2007-EV-003120A

Judge Diehl

ORDER

The above-styled adversary proceeding originates with Defendants' Notice of Removal filed October 3, 2007 in accordance with 28 U.S.C. § 1446(b) and Rule 9027(a)(3) of the Federal Rules of Bankruptcy Procedure. Plaintiffs filed a complaint in the State Court of Fulton County on August 31, 2007. The eight count complaint alleges breach of contract, breach of

fiduciary duties, negligent misrepresentation, fraud in the inducement, and other claims. Defendants are directors and officers of a jointly administered chapter 11 bankruptcy filed August 20, 2007 in the Bankruptcy Court for the District of Connecticut's Bridgeport Division ("*Halo* bankruptcy"). (*In re Halo Technology Holdings, Inc.*, case numbers 07-50480 through 07-50481, 07-50486 through 50494, 07-50496).

Before the Court is Plaintiffs' Motion to Remand And/Or Abstain ("Motion"). (Docket No. 18). Plaintiffs assert four arguments in the Motion: (1) the matter should be remanded because this Court does not have subject matter jurisdiction over the claims; (2) mandatory abstention applies under 28 U.S.C. § 1334(c)(2); (3) the Court should exercise permissive abstention under 28 U.S.C. § 1334(c)(1); and (4) equitable remand should apply in this case under 28 U.S.C. § 1452(b). Defendants filed a Response (Docket No. 21), and Plaintiffs filed a Reply (Docket No. 25). The matter came on for hearing on July 11, 2008. Present at the hearing were Hennen Ehrenclou and Richard Capriola of Weinstock & Scavo, P.C. on behalf of Plaintiffs and Lawrence Kunin of Morris, Manning & Martin, LLP on behalf of Defendants. At the hearing, the Court primarily heard oral arguments on the issues of subject matter jurisdiction and mandatory abstention. The Court made an oral ruling at the close of the hearing denying Plaintiffs' Motion. This Order summarizes the Court's oral ruling.

Pursuant to 28 U.S.C. § 1334(b), the district courts have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." In the Northern District of Georgia, Bankruptcy Judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred by the district court pursuant to 28 U.S.C. § 157(a). 28 U.S.C. § 157(b); Local Rule

83.7, N.D. Ga. The Court has subject matter jurisdiction over Plaintiffs' claims because the claims "arise in" and are "related to" the *Halo* bankruptcy proceedings.

Plaintiffs' claims to arise in the *Halo* bankruptcy for two main reasons. First, certain claims asserted by Plaintiffs are derivative claims owned by the debtor-in-possession. Debtor-in-possession is a Nevada corporation, and pursuant to Nevada law, derivative claims belong to corporation. *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993) (dismissing shareholder's individual claims because a breach of fiduciary duty claim belongs to the corporation and, therefore, is a derivative claim); *Shoen v. Sac Holding Corp.*, 137 P.3d 1171, 1179 (Nev. 2006); *Bedmore v. Familian*, 125 P.3d 1168 (Nev. 2006) (addressing derivative action for breach of fiduciary duty).

Second, Plaintiffs' claims also confer subject matter jurisdiction on this Court because the Directors and Officers Liability Policy ("Policy") at issue includes the debtor-in-possession as a named insured with a right to proceeds of the Policy. Thus the Policy and its proceeds are assets of the bankruptcy estate. *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, 197 F.3d 631, 638 (2d Cir. 1999); *Morris v. Nat'l Union Fire Ins. Co.*, 303 B.R. 743 (Bankr. E.D. Pa. 2004); *In re Medex Reg'l Labs., LLC*, 314 B.R. 716 (Bankr. E.D. Tenn. 2004). As evidenced by the April 3, 2008 Order entered in the *Halo* bankruptcy court proceedings, the debtor-in-possession has court authority to provide payment and/or advance defense costs under the Policy. (Docket No. 321, *In re Halo Technology Holdings, Inc.*, Jointly Administered, Beginning Case No. 07-50480). Therefore, Plaintiffs' claims arise in the *Halo* bankruptcy and this Court has subject matter jurisdiction over Plaintiffs' claims.

The Court has jurisdiction over Plaintiffs' claims because the claims are "related to" the *Halo* bankruptcy case. The standard for determining whether a civil proceeding is sufficiently related to the bankruptcy case is "whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy" or "alter the debtor's rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankrupt estate." *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 (11th Cir. 1990) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)); *see also Cont'l Nat'l Bank v. Sanchez*, 170 F.3d 1340, 1345 (11th Cir. 1999) (adopting the *Pacor* test). Here, Defendants, as directors and officers of Halo Technology Holdings, are named insureds in the Policy. The Policy and its proceeds are assets of the bankruptcy estate, and, especially as a declining balance policy, property of the *Halo* bankruptcy estate would be implicated by the causes of action asserted by Plaintiffs. These facts easily meet the "related to" standard of "conceivably hav[ing] an effect on the estate."

Mandatory abstention is inapplicable under 28 U.S.C. § 1332(c)(2):

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1332(c)(2). The Court's determination that Plaintiffs' claims provide subject matter jurisdiction because the asserted claims "arise in" the *Halo* bankruptcy case is dispositive regarding mandatory abstention. Yet Plaintiffs also failed to prove that the

action could be “timely adjudicated” in the State Court of Fulton County. The Policy itself and related claims are property of the estate, and, consequently, any state court proceedings would be stayed pursuant to 11 U.S.C. § 362. Therefore, two statutory requirements for mandatory abstention are not satisfied.

For these reasons and those set forth orally on the record, it is

ORDERED that Plaintiffs’ Motion to Abstain And/Or Remand is hereby **DENIED**.

The Clerk shall serve a copy of this Order on Plaintiffs, Plaintiffs’ counsel, Defendants, Defendants’ counsel, and the U.S. Trustee.

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